

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DRB

ALBERT A. SEIFERT,)
)
 Petitioner,)
)
 v.) Docket No. 24735-12 L.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

ORDER AND DECISION

This is a “collection due process” (“CDP”) case brought under section 6330(d), in which we review a collection determination by the Office of Appeals of the Internal Revenue Service (IRS). Respondent (the Commissioner of Internal Revenue) moved for summary judgment on August 27, 2013; petitioner Albert A. Seifert filed a response on September 13, 2013; and the Commissioner filed a reply on September 30, 2013. We will grant the Commissioner’s motion.

Background

Mr. Seifert’s securities transactions

During the year 2007 Mr. Seifert engaged in numerous securities transactions. We assume (without deciding) the facts that he alleges about these transactions--i.e., that he acquired these securities at a cost of over \$113 million, that they yielded total sale proceeds to him of over \$114 million, and that his gain from these sales was \$560,811.

Mr. Seifert further alleges (and we assume) that he prepared an income tax return for the year 2007 on which he reported those gross proceeds, that cost, and that gain. Mr. Seifert also alleges (and we assume) that he attempted to file electronically (and believes he did file) such a tax return for 2007; but the IRS’s records show that it received no 2007 return from Mr. Seifert.

SERVED Oct 18 2013

Issuance and receipt of the IRS's notice of deficiency

The IRS did receive from third parties Forms 1099 reporting the securities transactions--but not reflecting any cost basis for Mr. Seifert. The IRS therefore issued to Mr. Seifert, pursuant to section 6212, a statutory notice of deficiency on which all the gross sale proceeds were reflected as income (with no reduction for any cost), and on which the IRS determined a tax liability of over \$39.8 million, plus additions to tax, penalties, and interest for which the total now exceeds \$70 million. We therefore assume (without deciding) that this figure greatly exceeds his actual liability.

Mr. Seifert admits in his petition that a notice of deficiency “was indeed mailed to my address which was in a drastically incorrect amount”. See also Ex. 21 (letter of 6/6/2012; “notice of deficiency letters sent to me”); reply filed 2/21/2013, para. 8(c) (“Petitioner received deficiency notice.”). Mr. Seifert thus does not dispute that he received the notice of deficiency. In his request for a CDP hearing discussed below, Mr. Seifert asserted that “no deficiency notice was received”, but in his opposition to the Commissioner’s motion he explains that “his meaning is that ‘no accurate deficiency notice was received.’ Respondent indeed sent Petitioner inaccurate deficiency notice(s) reflecting zero cost basis tax liability for year involved. (2007)”. (Emphasis added.)

However, Mr. Seifert did not file a suit in Tax Court challenging that notice of deficiency pursuant to section 6213(a).

Levy notice and CDP hearing

The IRS therefore assessed the deficiency and issued to him a notice of levy and of his right to a CDP hearing pursuant to section 6330. Mr. Seifert then requested that CDP hearing, which was conducted by the IRS Office of Appeals. His CDP request on Form 12153 asserted that “Balance is drastically incorrect.”

On that form Mr. Seifert also checked the box indicating that “I cannot pay balance”; but the IRS’s motion shows--and Mr. Seifert does not dispute--that he did not submit financial information about himself to Appeals on Form 433 to substantiate his inability to pay. Rather, his sole contention in the CDP hearing was his challenge to the 2007 liability. As he explains in his opposition to the IRS’s motion, “the sole subject and entire reason for this case existing is the issue

of whether or not the (approximate) \$70 million intent to levy notice which the Respondent filed against me for tax year 2007 is valid and actual”.

(The Commissioner contends that Mr. Seifert did not properly raise during the CDP hearing his cost basis in the securities sales; but Mr. Seifert disputes this contention. For purposes of the pending motion, we assume that Mr. Seifert did raise the issue and did present at least some factual support for his contention that his cost was over \$113 million.)

Notice of determination and petition

On September 6, 2012, IRS Appeals issued a notice of determination sustaining the notice of levy, pursuant to section 6330(c)(3). On October 1, 2012, Mr. Seifert then timely mailed a petition to this Court pursuant to section 6330(d), appealing that determination.

On August 17, 2013, the Commissioner filed his motion for summary judgment, arguing that Mr. Seifert cannot challenge his liability in this proceeding. However, the Commissioner explains (at pages 2-7 of its reply filed September 30, 2013) that, outside the CDP context, Mr. Seifert may either request audit reconsideration or submit an Offer in Compromise based on Doubt as to Liability.

Discussion

Prior opportunity for dispute

Mr. Seifert asserts that “the sole subject” of this case is his contention that he does not actually owe the tax that the IRS is attempting to collect from him for 2007. That is, he challenges the asserted liability. We observe that it is a very plausible challenge, since gain on a sale must take into account the seller’s cost.

When Mr. Seifert received the notice of deficiency, he had an opportunity to challenge that liability in Tax Court. He could have presented evidence of his cost basis in the securities and, depending on his proof, could have seen his liability reduced or eliminated. But he did not do so. Consequently, the IRS’s determination went unchallenged, and the IRS therefore had the right and the responsibility to assess and collect the tax it had determined. When the IRS undertook to collect the tax, then Mr. Seifert attempted for the first time to challenge that liability--in the CDP hearing.

However, under section 6330(c)(2)(B), Mr. Seifert may raise a challenge to the underlying liability as part of the CDP hearing only if he “did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.” But Mr. Seifert does not dispute that he did receive a notice of deficiency with respect to his 2007 liability. As a result, he is not permitted in the agency-level CDP hearing (nor in this judicial review of it) to challenge that liability.

Other issues

Mr. Seifert does not advance other issues that we might review. He did not propose any installment agreement or offer in compromise; and denial of a collection alternative when none is proposed or requested is not an abuse of discretion. See Kendricks v. Commissioner, 124 T.C. 69, 79 (2005). Mr. Seifert’s initial request for a CDP hearing seemed to indicate that he “cannot pay balance” and that he might therefore request that Appeals put him in “currently not collectible” status. However, he did not substantiate that status by providing his financial information on Form 433, so Appeals did not abuse its discretion by not granting that status. Pitts v. Commissioner, T.C. Memo. 2010-101, slip op. at 17-20.

It is therefore

ORDERED that the Commissioner’s motion for summary judgment is granted. However, Mr. Seifert is strongly encouraged to consider accepting the invitation of the Commissioner (made at pages 2-7 of his reply filed September 30, 2013) either to request audit reconsideration or to submit an Offer in Compromise based on Doubt as to Liability, outside of the CDP context. It is further

ORDERED AND DECIDED that the proposed collection action in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated September 6, 2012, for tax year 2007 is sustained.

(Signed) David Gustafson
Judge

ENTERED: **OCT 18 2013**